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LAW REPORTING.*

The Committee on Library and Legal Literature consider that anything pertaining to legal publications falls peculiarly within their province. With a view of elevating the standard of our State law books, we have heretofore pointed out some particulars in which our statutory publications might be bettered; and our last two reports have had something to say on the accumulation of case law, and have predicted that the limit had been reached, and that reaction was inevitable. These remarks have at least had the effect of directing attention to the subject, and many legal articles and editorials have appeared in the past year discussing the question of law reporting in its various phases. Our association was, so far as known to us, the pioneer in appointing a permanent committee on legal literature, and it is gratifying to know that the example is being followed; for the American Bar Association at its last meeting established a standing committee of five on law reporting, the avowed object of the gentleman who offered the resolution being to reduce the number and cost of the reports. The present, therefore, seems an appropriate time for offering to the association some thoughts upon the subject of official law reporting—a time specially apposite in our State, as it coincides with an interregnum between two official reporters.

Among publishers, Mr. Soule, of the Boston Book Company, is preeminent in his knowledge of legal bibliography. In his circular for November, 1894, he gives a table showing the comparative frequency of citation of the Federal, English, and State decisions, outside of their

*This paper was prepared by Robert M. Hughes, Esq., of Norfolk, Chairman of the Committee of the Virginia State Bar Association on Library and Legal Literature, and was read as the report of the committee at the annual meeting of the association held at the White Sulphur Springs, W. Va., August 6, 7 and 8, 1895.

own respective jurisdictions, compiled from the last official volume of each prior to 1894. The table is as follows:

United States	1669	Georgia	92
English	1594	Tennessee	89
New York	1424	Kentucky	87
Massachusetts	1268	Nebraska	78
California	805	Mississippi.	70
Pennsylvania	532	South Carolina	66
Illinois	471	Virginia.	66
Michigan	385	Colorado	62
Iowa	355	Louisiana	59
Indiana	317	Nevada	58
Missouri	306	Arkansas	53
Wisconsin	303	Rhode Island	39
Maine	230	Oregon	39
Minnesota	215	West Virginia	34
Ohio	207	Arizona	22
Connecticut	206	Montana	21
New Hampshire	205	Idaho	15
New Jersey	205	Florida	14
Alabama	163	South Dakota	13
Kansas	158	Washington	12
Vermont	151	North Dakota	9
Maryland	131	Delaware	8
Texas	126	Wyoming	2
North Carolina	103		

This table is far from flattering. To find the decisions of Virginia, the oldest of the States, rank thirty-one in a list of forty-seven, to find the Federal Supreme Court decisions cited twenty-five times as often, the English decisions twenty-four times as often, the New York decisions twenty-one times as often, the Massachusetts nineteen times as often, and even the Texas twice as often, is mortifying, to say the least, and encourages us to deal with the subject frankly, in the hope that our suggestions may tend to reduce the art of law reporting to a system of which our official reports will reap the first fruits. A calculation of present case law is appalling. If we take it for the year 1893 (as nearly as court terms commencing at different dates will permit), we will find that the American included the following number of pages:

United States Supreme Court	2,875
Federal Reporter	5,118
National Reporter System 17,934 pp., each equal to 3 pp. United States Supreme Court	53,802
Total	61,795

Hence, any American lawyer who wishes to keep up with it, if he is enough of a Christian to omit Sundays and enough of a patriot to omit legal holidays, thereby reducing his working days to about 300, would be obliged to read over 200 pages a day, excluding entirely his preparation for special cases and his study of earlier decisions. In fact, these judicial law factories are the only kind that hard times do not seem to affect. We might look upon an occasional strike among them as a blessing in disguise, but against them even dynamite and mobs are powerless. Unlike others, they never shut down or run on half time. Unlike others, they never continue for the mere purpose of working up crude material, for it is inexhaustible. Unlike others, they never restrict their output to the finer products. And the insatiable press hastens to shower upon us this immense production, printing everything—except the judicial joke.

What is the remedy? It is beyond the reach of legislation. It is nothing else than the gradual education of the bench and bar to the formation of a public opinion which will reduce the business of reporting to rules as definite as those which govern any other science. Only discussion and interchange of views can develop the proper system, and that interchange of views is being inaugurated. The suggestions which we make must, therefore, be considered as merely tentative. They are far from exhaustive, some may be incorrect, but we believe that many will enter into the preparation of the future model report.

The parties most responsible for the excellence of an official report are, first of all, the judges who write the opinions, and next the reporter who prepares them for publication. Perhaps it is unjust to blame the publishers for printing opinions which, when filed, are official records. They are not responsible for their bulkiness or crudity. We must go to the very source to purify the stream, and confine its volume within proper limits. Hence we must consider the correct method of writing an opinion; for the first requisite of a model report is that it should be a collection of model opinions.

Our first hint as to the preparation of opinions recalls the answer which the *London Punch* once gave when asked what advice it had to give to a young couple about to marry. Its reply was simply "Don't." Our reports team with lengthy opinions where none were necessary. It subserves no useful purpose to prepare elaborate dissertations on mere questions of fact affecting only the litigants. This is specially noticeable in criminal or negligence cases, where page after page is devoted

to excerpts *verbatim* from the testimony, making the opinion like a crazy-quilt.

Another class where opinions are unnecessary are those numerous cases which merely reaffirm some previous decision without involving any new principle. In such cases a line stating that in the judgment of the court the previous decision is conclusive of the case is all that is necessary, and it is superfluous to discuss the question a second time. In both these classes a few words announcing the conclusion of the court answer every purpose; and, so far as our own State is concerned, would satisfy the constitutional requirement that the court should give its reasons in writing, for that has never yet been held to mean that the court should give its reasoning in writing.

Americans are not the only sufferers from this *cacoethes scribendi.* From antipodal India comes a like despairing wail. A law journal published there, under the name of the *Legal Companion,* says, after calling attention to the number of Indian reports:

"It is really painful to think of having to read all these books. But there might be much reduction of reportable matter, and much of the valuable time of the judges, practitioners and law students might be saved if the judges do not attempt to lay down the law when in fact they merely follow earlier decisions."

Another instance where opinions should not be written is where a court is equally divided. In such case an opinion on the prevailing side inevitably provokes a dissenting one, in consequence of which two tedious legal essays are hurled at the profession, neither of which is binding. In fact, it is questionable whether dissenting opinions ought to be reported. A minority judge ought to be allowed to preserve his consisteney by stating the fact of his dissent; but that is a very different thing from allowing him to weaken the force of an opinion which, whether sound or not, ought to be treated as the law just so soon as the majority of the court announces it as such. And, in addition, the exclusion of written dissents would enhance the dignity of courts by hiding from the public eye many judicial wrangles which should never be known beyond the doors of the conference-room.

Passing to the cases where written opinions are admittedly proper, the cardinal rule of all is that brevity is the soul of wit. An examination of recent reports shows that the average opinion of the United States Supreme Court is about ten pages, of the Massachusetts Supreme Court about eight pages, of the New York and Virginia Supreme Appellate Court about seven pages. And this includes many that are

but a few lines in length. These figures, instead of being an average, should be a limit, for the cases that cannot be discussed in seven printed pages are rare indeed. Either this is true, or the judges treat the lawyers with great injustice in limiting their arguments to two hours on each side. Attorneys in their speeches are expected to place the court in full possession of all material facts, besides debating numerous assignments of error. If they can do this properly in two hours, surely the judges, whose opinion need only state their conclusions, and who can select as few or as many of these assignments as they please and quietly ignore the balance, ought to be able to do so in a few pages.

In attaining brevity, the main thing to bear in mind is, that the opinion should pass simply upon the question directly involved, and should not inflict upon the profession elaborate treatises upon collateral matters not necessary to the conclusion. In the lexicon of law there should be no such words as *dictum*, *quaere* or *semble*. Nothing should be promulgated which is not so interwoven as to render the opinion incomplete in its absence. If its omission leaves the reasoning intact and the conclusion still inevitable, it is not properly a part of the opinion, and has no binding force. Its publication only tends to confuse inferior courts and mislead practitioner and client, who may acquire substantive rights upon the faith of it. It may be pleasant to judicial conceit to expatiate upon points not discussed by counsel, and to claim credit for making the case turn on questions not alluded to in the briefs, but it is a hazardous experiment, for even the ablest judge is more apt to be mistaken than the attorneys who have been in the case from the very beginning through all its stages. Opinions so prepared have lacked the discussion necessary for thorough elucidation, and may be the cause of future regret.

Another important consideration in the preparation of an opinion is that great elaboration should be avoided. Long and tedious statements and discussions of questions settled in previous cases are wholly unnecessary. A judicial opinion in its framework ought to be like a geometrical proposition. It ought to assume as hypotheses doctrines already settled, state the new facts to which they are to be applied, show that they apply by reasoning from one established doctrine to another, and at last draw the final conclusion. It is no more necessary for a judge to re-argue and re-settle established propositions, than it would be for a geometer who wishes to prove the last theorem in his geometry, to go to work and re-prove all that have preceded it. On this subject Judge Rothrock, of the Supreme Court of Iowa, has lately said :

"Courts of last resort are given to too much elaboration. The opinions are much more extended than necessary. The iteration and reiteration of the fundamental principles and the citation of authorities in their support ought to be excluded as mere rubbish. The opinions of courts are not for the purpose of instruction in rudimentary law. If a new question arises it should be properly treated and the reasons given therefor. But the citation of scores of cases on the common question should be omitted. A recent writer has said that there are opinions now being rendered by the courts, each of which cites more authorities than John Marshall cited in all the cases ever written by him."

These eminently sensible and practical remarks suggest another particular in which judicial opinions may be abbreviated in such way as not only to reduce their length but also to add greatly to their clearness. That is, by being economical of citations, and quotations. In stating the doctrines which are the successive steps in the reasoning, it is unnecessary to cite more than one authority for each, unless it is a question on which there has been a conflict of adjudication. If an authority is worth citing at all, it ought to be able to stand alone. In fact, many premises are so plain as to need no citation: for the court ought to presume that its practitioners know something. Yet how many judicial opinions contain references by the dozen in support of legal questions on which two lawyers of ordinary learning would hardly differ!

See as illustrations the case of *Simon v. Ellison*, 90 Va. at p. 158, where the opinion cites ten authorities to establish the doctrine that no one is bound by a decree in a case to which he is not a party; and the case of *Mining Co. v. Mining Co.*, 157 U. S. at p. 687, where the court, after first stating that the law is well settled, proceeds and cites fourteen cases to support the point that a judgment is not conclusive as to matters which might have been decided, but only as to those in fact decided.

In geometry, axioms are taken as true without proof. Is there any reason why legal axioms should be different?

The jurist who with mind as unerring as the mathematician's lays down his premises step by step without tedious elaboration, without pausing to prove what everybody knows, without digressing to discuss every collateral issue, until he reaches his goal by an air line of resistless reasoning, will leave a name which will be cherished by a grateful profession long after the long-winded essayists and digesters have been forgotten. His will be the model opinion.

If the art of opinion writing is reduced to some system, little remains to be said of the official reporter, for when opinions are well and clearly

written, the task of a reporter is an easy one. Perhaps his most important duty is the preparation of the head-note. This is vital, for it is the key to the decision. Text-writers and digesters rarely look beyond it; so that, if it does not give the point actually decided, the future investigator will never find it and it might as well be buried under the form of the Sphinx.

To prepare a proper head-note the reporter must thoroughly master and understand the opinion, and his head-note should simply state the final conclusion of the court. The common practice of inserting the successive steps of the reasoning merely used by the court as premises from which to evolve the conclusion, is wrong in principle and misleading in practice. It is unjust to the Court in making them gravely decide elementary questions; and it is misleading to practitioners and legal writers in covering up the true issue with a mass of rubbish. If the structure of an opinion should follow that of a geometrical proposition, then the head-note by analogy should be simply the statement of the propositions. What would be thought of the geometer who would insert his reasoning in his statement? Does not the reporter violate the same rule of logic when he does it? We frequently see head-notes almost as long as the opinion when their different type is taken into account, composed mainly of mere extracts, and those extracts taken from the reasoning of the opinion and not from its final conclusion. Unless the assignments of error are numerous and disconnected, those opinions are scarce whose final conclusions cannot be expressed in a few words, and that is all that the head-note should be.

It follows from this that the head-note itself should not contain references, as is often the case. They may be appropriate in the reasoning, but they have no place in the final conclusion; for when that is stated their purpose has been already accomplished.

In stating the head-note the reporter should, as far as possible, express it in the cencrete. In other words, he should give the controlling facts of the case and apply to them the general proposition which the court holds to govern them; and not merely state the general proposition in general terms, as if that were the decision.

Let us illustrate this by an example for the sake of clearness. In *Saunders v. The Commonwealth*, 79 Virginia 522, the defendant offered a plea of "once in jeopardy," which the court rejected. From this order he appealed, without saving the point, going on with the trial and finally appealing in the event of conviction. The court dismissed

his writ of error on the ground that the order was not final. It would seem that the head-note in such case should have been:

"An order rejecting a plea of 'once in jeopardy' is not a final judgment." From this, if properly indexed, the future practitioner can learn at once how to protect his client if his plea of "once in jeopardy" is rejected. But the head-note in the official report is as follows:

"In a criminal case a writ of error lies only to final judgment." This is a mere quotation from the reasoning of the court and gives no light on the special question involved, the character of an order rejecting a plea of "once in jeopardy." It represents the court as deciding in all solemnity a legal axiom, when in fact the opinion assumed it as settled and proceeded to bring a special state of facts under its range.

The law student who wishes to know how to act when his plea of "once in jeopardy" has been thrown out, would never suspect from that head-note, if he saw it in a digest, that the court had ever passed upon the question.

The next important duty of the reporter is to make a thorough index. This may be a tedious task, but it is an essential one and should not be done purfunctorily. An unindexed or improperly indexed decision is like an undocketed judgment. The above case is not indexed even in the volume containing it, and hence has not found its way into the digests, which are compiled from the separate *indices*. The investigator will search for it in vain, and the omission may introduce error into some future case and cause the loss of a substantial right.

We might add that the reporter should make no annotations of his own. However much in point they may be, however eminent a lawyer or reporter may be, an official report should contain nothing that is not official. A reporter is not a critic, and our judicial opinions are presumed to need no reinforcement. His duty is to report them, not to discuss them.

It may also be laid down as a general rule that the report should not contain the arguments of counsel. There may be some exceptions, but the opinion is pretty certain to reflect the line of argument and put the reader in possession of the important issues. If it does, the purpose of a report is answered and everything else is superfluous.

This brings us to another class who may influence the preparation of a report. They are the practitioners, whose briefs largely sway the court and furnish material for their opinions.

The rules which govern the preparation of an opinion enter largely into the preparation of a brief. It too should reason from step to step,

from principle to principle, citing but one good authority for each and not breaking the flow of thought by padding with a mass of citations. The modern practice of cutting it up into numberless paragraphs, prefaced by headings of small capitals and loaded down with cases and quotations in bold-faced type, destroys all closeness of reasoning. It is not the judicial eye but the judicial mind which we want to impress. If our ideas do not impress the latter, our type will vainly appeal to the former. A return to briefs which are arguments and not digests will exert a powerful influence in the production of model opinions.

In what we have said we do not wish to be understood as having our own official reports solely in mind. So far as the work of the reporter is concerned, we belive it above the average and that it has shown a constant improvement. We have referred to certain special instances in no fault-finding spirit, but solely by way of illustration, and we hope in conclusion that our remarks may cause those most interested to give the subject earnest thought and result in an endeavor on the part of all to restore our reports to the eminence which they enjoyed in the days of Roane and Tucker.

Respectfully submitted.

AN APPEAL TO THE AREOPAGUS.

There is a question of State Rights, lying deeply buried in the voluminous Virginia *Habeas Corpus* cases—*in re Ayres, in re Scott, in re McCabe* (123 United States Reports, page 443)—to which it is desired, in this place, to invite attention, and to suggest a solution of it different from the one which, so peremptorily, it has received from the Supreme Federal Court. In this country of independent thought and free discussion, there is reserved for an oppressed, or misunderstood, truth an appeal to the forum of opinion which is supplied with a more potential executive force than the utterance even of an ultimate Federal Court.

In that jurisdiction a light is permitted to penetrate through any cleft or fissure, although to shine with a feeble and struggling ray. Within those precincts is a Hill of Mars, on which an Areopagus holds midnight sessions, administering a blindfold justice, open to every suitor. To this court, thus high-throned, this appeal now is carried.

In a government, as this republic of combined sovereign States,